

November 8, 2010

Environmental Protection Agency
Via <http://www.regulations.gov>

Re: Docket ID No. EPA-R03-OW-2010-0736
Chesapeake Bay Total Maximum Daily Load

Dear Sir/Madam:

I submit these comments on behalf of the James River Association (JRA). JRA is a 501(c)(3) non-profit corporation and has worked for over 30 years to protect and restore the James River, its tributaries, and the lands within the James River watershed. JRA pursues its goals through diverse programs in river advocacy, James Riverkeepers, watershed restoration and environmental educational.

The JRA staff uses Virginia water bodies for scientific study, educational programs, and recreational purposes that are vital to our mission. JRA owns land adjacent to the James River and conducts programs on the river and adjacent properties giving it valuable economic interests in protecting water quality and the health of the river. JRA's members enjoy a wide range of recreational activities, including fishing, swimming, and boating, throughout the James River Basin and in other Virginia water bodies. Also, our members have important economic, professional, and aesthetic interests in the health of Virginia water bodies. Thus, JRA and our members have direct, substantial, past, and ongoing interests that will be affected by the Chesapeake Bay Total Maximum Daily Load and the Virginia Watershed Implementation Plan.

JRA incorporates by reference the comments submitted by the Choose Clean Water Coalition, of which JRA is a member. Furthermore, JRA supports the U.S. Environmental Protection Agency in its development of a Chesapeake Bay Total Maximum Daily Load (TMDL) as required by the Clean Water Act. This action is critical to achieving water quality standards for the James River and Virginia's other tidal waters of the Chesapeake Bay. Additionally, the Chesapeake Bay TMDL and Virginia Watershed Implementation Plan will also greatly help address pollution and impairment of local streams, rivers and other waters, which have the same legal protections as the entire Chesapeake Bay.

JRA much prefers the development and implementation of a sufficient Virginia Watershed Implementation Plan (WIP) as the guide for efforts to achieve water quality standards for the James River that would obviate the need for any EPA backstop actions. However, in the event that the state fails to fulfill its own legal duties and obligations to address water pollution and impairments in the James River, JRA supports EPA enactment of backstop actions to provide reasonable assurance that necessary pollution reductions will be achieved.

JRA has found substantial concerns with Virginia's Draft WIP and therefore encourages EPA to remain steadfast in its efforts to hold states accountable for addressing deficiencies in their WIPs and implement backstop actions if required. JRA's comment letter to the Commonwealth of Virginia regarding concerns, suggestions and recommendations for Virginia's Draft WIP is attached to this letter as Exhibit 1. Of particular concern are the failure to meet the James River allocations for nitrogen and phosphorus, lack of detail for achieving agricultural pollution reductions, over reliance on an expanded nutrient trading program and unrealistic goals for pollution reductions from existing urban areas and septic systems. JRA also has a special interest in Virginia's proposal to review the James River chlorophyll standards. JRA urges EPA to use its legal authority and technical expertise to ensure that the final Virginia WIP appropriately addresses these concerns and provides a cost-effective plan that achieves a fully healthy James River.

EPA's role is important not only to ensure that Virginia does its job for the James River, but also to ensure equity among the Chesapeake Bay jurisdictions. Consistent accountability and enforcement by EPA is essential to make certain that all Bay jurisdictions do their part for the Chesapeake Bay and prevent a jurisdiction that does commit the necessary actions and resources to fulfill its responsibilities from facing a competitive disadvantage of some sort compared to other Bay jurisdictions.

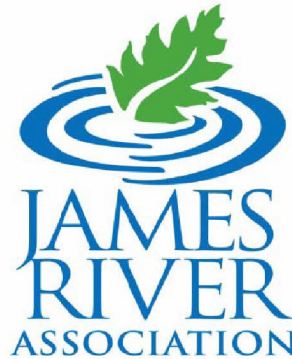
Thank you for the opportunity to comment on this important matter. If you have any questions or would like additional information on any of our comments, please do not hesitate to contact me at 804.788.8811 or bstreet@jrva.org.

Sincerely,



William H. Street
Executive Director
James River Association
9 South 12th Street, Fourth Floor
Richmond, VA 23219

Exhibit 1



November 8, 2010

Commonwealth of Virginia
vabaytmdl@dcr.virginia.gov

Re: James River Association Comments on Virginia Draft Watershed Implementation Plan

Dear Sir/Madam:

I submit these comments on behalf of the James River Association (JRA). JRA is a 501(c)(3) non-profit corporation and has worked for over 30 years to protect and restore the James River, its tributaries, and the lands within the James River watershed. JRA pursues its goals through diverse programs in river advocacy, James Riverkeepers, watershed restoration and environmental education.

The JRA staff uses Virginia water bodies for scientific study, educational programs, and recreational purposes that are vital to our mission. JRA owns land adjacent to the James River and conducts programs on the river and adjacent properties giving it valuable economic interests in protecting water quality and the health of the river. JRA's members enjoy a wide range of recreational activities, including fishing, swimming, and boating, throughout the James River Basin and in other Virginia water bodies. Also, our members have important economic, professional, and aesthetic interests in the health of Virginia water bodies. Thus, JRA and our members have direct, substantial, past, and ongoing interests that will be affected by the Virginia Watershed Implementation Plan.

Virginia's Duty to Develop and Implement a Watershed Implementation Plan

Virginia has a legal obligation to address impairments and pollution of its waters. Beginning with the Commonwealth's highest law, the *Virginia Constitution*, Article XI states that "it shall be the policy of the Commonwealth . . . to protect its . . . waters from pollution, impairment, or destruction..." Furthermore, the *Water Quality Monitoring, Information and Restoration Act* directs the Commonwealth to develop and implement a Total Maximum Daily Load implementation plan. Additionally, the *Chesapeake Bay and Virginia Waters Clean-up and Oversight Act* directs the Secretary of Natural Resources to develop a plan for the cleanup of the

Chesapeake Bay and Virginia's waters designated as impaired by the U.S. Environmental Protection Agency (EPA) that is largely similar to the expectations set for the WIP by EPA, including milestones; measurable and attainable objective; time frames; clearly defined, prioritized, and sufficiently funded program of work; disbursement projection plan; potential problem areas where delays in the implementation of the plan may occur; a risk mitigation strategy; a description of the extent of coordination between state and local governments; and an assessments of alternative funding mechanisms.

Despite the concerns raised over the Chesapeake Bay TMDL as an “unfunded federal mandate” and over the role of EPA in fulfilling their legal requirements under the Clean Water Act, JRA believes that the Chesapeake Bay TMDL process serves to ensure that Virginia follows through with its own mandates and obligations for the Chesapeake Bay and its tidal waters. The Chesapeake Bay TMDL and Virginia WIP will also greatly help Virginia address pollution and impairment of local streams, rivers and other waters for which it has the same legal obligation to clean and protect.

Overall Concerns with the Draft Phase I Virginia WIP

JRA greatly appreciates the time and effort spent by the Office of the Secretary of Natural Resources, Department of Environmental Quality and Department of Conservation and Recreation in developing Virginia’s Phase I Watershed Implementation Plan for the Chesapeake Bay Total Maximum Daily Load. The cleanup of the Chesapeake Bay and its tidal waters is a complex and significant task. It is a task that Virginia has been working on for twenty-five years and therefore, many of the solutions and needed actions are known. The Chesapeake Bay TMDL and Virginia WIP provide an opportunity to strengthen Virginia’s efforts and focus its resources to fully meeting its legal responsibilities for addressing pollution problems and impairments in its waters.

JRA has the following general comments on the Draft WIP, followed by more specific comments and suggestions for individual sectors.

The Draft WIP Does Not Meet James River Pollution Limits – One of JRA’s greatest concerns with the Draft WIP is that it fails to meet the pollution limit that is needed to achieve Virginia’s water quality standards for the James River. Virginia’s WIP states that it will only meet 60% of the needed pollution reductions even though those standards are attainable through available technology and a similar level of effort that is being implemented in other basins.

Instead of meeting the current James River algae standards, the draft Virginia WIP proposes to review the standards and potentially change them before any additional reductions are planned. While JRA recognizes that the James River algae standard will be reviewed as part of Virginia’s 2011 triennial review of all water quality standards, JRA maintains that it is inappropriate to compromise the requirement of the TMDL and WIP of meeting water quality standards based on possible future actions. The Draft WIP should be revised to include actions necessary to fully meet the James River allocation by 2025. Not only will this better meet federal and state requirements, it also will maximize the planning time for the additional actions. After the re-

assessment of the algae standards, if some reductions are not necessary to achieve water quality standards, they can more easily be eliminated than added at that time.

The Draft WIP Does Not Set 2-year Milestones – The plan does not identify two year milestones for actions and pollution reductions that are needed to meet the longer term 2017 goals. The Chesapeake Bay states and EPA recognized that the past policies that set only long term pollution reduction goals were insufficient to ensure accountability and continuous progress and agreed to set two-year milestones to correct this shortcoming. The Virginia Draft WIP only includes goals for 2017 and 2025.

The Draft WIP Relies Too Heavily on Expanded Nutrient Trading – The draft Virginia WIP calls for a greatly expanded nutrient trading program. Currently, Virginia's nutrient trading program allows for trading to comply with wastewater discharge permits and stormwater permits for new development and is generally targeted to provide flexibility in reaching the last amount of pollution reductions which can be the most expensive. The Virginia Draft WIP would expand this to include all major pollution sources and proposes to utilize this mechanism to drive large levels of pollution reductions. The scope of the proposed pollution trading program extends well beyond any such program implemented to date in the nation. However, the plan does not provide sufficient detail on how the program would be established and whether there would be adequate supply and demand to create a market of the size and scope envisioned by the draft WIP.

As long as local water quality is sufficiently protected, JRA supports the development and use of a nutrient trading program to increase cost efficiencies of meeting the Chesapeake Bay allocations. We suggest that sector allocations be set at attainable levels and that the trading program be available as an option for appropriate sectors to reduce costs. Under the Draft WIP, some sectors would have no option but to trade in order to meet their allocation, which would distort the market and lead to less cost efficiencies.

Many Actions in the Draft WIP Are Unclear – Although specific programs and policies and even draft legislation were developed and proposed by the state agencies, the draft WIP removed nearly all references to specific policy actions that would be proposed. This calls into question how the needed actions will be achieved and undermines the credibility of the plan and the assurance that the plan will be implemented sufficiently to achieve water quality standards. We recognize that the plan itself cannot commit to certain actions if they require legislative approval, but the plan can and should provide a clear picture of what mechanisms will be pursued.

Comments on Sector Allocations and Plans

Wastewater – In the Draft WIP, wastewater discharge limits were maintained at current permitted levels despite the need for additional reductions to achieve water quality standards. Additional nitrogen and phosphorus pollution reductions are needed from wastewater discharges in the James River basin to meet the James River allocations in a cost effective, reliable manner. The following points demonstrate the need for lower pollution limits for wastewater discharges in the James River basin:

- The level of treatment being implemented for many wastewater discharges in the James River basin is significantly less than in other basins. As stated in the Draft WIP, wastewater effluent concentrations for the Lower James River are 3-4 times higher than those in the Potomac and Rappahannock basins.
- Wastewater discharges comprise 50% of total James River pollution loads, making it practically impossible to achieve the goals for the James River without additional reductions from wastewater discharges.
- Although wastewater discharges have installed much pollution treatment over the past 25 years, additional wastewater treatment is still among the most cost effective approaches and is the most reliable means to achieving nitrogen and phosphorus reductions.
- Wastewater provides the greatest opportunity to harness new technologies that can turn a pollution streams into a revenue streams, such as the algae biofuel project at Hopewell and the fertilizer production at the Nansemond plant in Suffolk.

JRA supports the following actions related to wastewater pollution control in the Draft WIP:

- Require wastewater effluent concentrations for municipal wastewater discharges in the Lower and Tidal Fresh James River at the same level as those for the Rappahannock, Potomac and Eastern Shore. Set comparable pollution treatment levels for industrial wastewater discharges in the Lower and Tidal Fresh James River.
- Require offsets for new non-significant municipal or industrial discharges.

Agriculture – While the allocation for agriculture in the Draft WIP is appropriate and the projected implementation levels for input deck BMP's are reasonable, the plan lacks sufficient detail for the programs and policies that will be proposed in order to achieve them. The Draft WIP acknowledges that additional incentives and requirements/other mechanisms will be needed to meet the projected implementation levels but does not offer any specifics of what they will be. A number of policies and even proposed legislation were circulated and discussed with members of the Stakeholder Advisory Group, of which JRA was a member. However, none of the program delivery mechanisms was described sufficiently in the Draft WIP. In order to provide reasonable assurance that the projected implementation levels will be achieve, the final WIP must provide greater detail for the delivery mechanisms.

Members of Virginia's agricultural community have suggested an approach that would provide flexibility to farmers through the use of a conservation plan. Such an approach has the benefits of allowing farmers to select the practices the best fir their operation, thereby gaining greater buy-in from the farmer and the agricultural community as a whole. However, in order for this approach to be successful and provide reasonable assurance, it must include the following elements:

- A specific methodology for the conservation plan that ensures a comprehensive assessment of the farm operation
- A performance standard for the conservation plan that can be tied to needed nutrient and sediment pollution reductions. (This will also facilitate nutrient trading be establishing a baseline beyond which pollution reductions could become nutrient credits.)
- Clear accounting of BMP's implemented both prior to the plan and on an on-going basis
- Verification of practice implementation and function over time

- Accountability for lack of implementation.

A key factor in achieving the agricultural allocation will be funding for cost-share programs and technical assistance. JRA supports full funding of state and federal agricultural cost-share and technical assistance programs. We urge you to incorporate into the final WIP a commitment to pursue full funding of the Virginia Agricultural Cost-Share Program as specified in the annual funding needs assessment for Virginia agricultural BMP's prepared by DCR for the Virginia House Appropriations and Senate Finance Committees. JRA also supports prioritizing large farms for early implementation and accountability and providing incentives for early adoption.

Urban - The pollution reductions proposed in the Draft WIP for existing urban areas are set at the absolute highest levels that are technically feasible. It is widely understood that pollution reductions from retrofitting existing urban areas are the most expensive to achieve and that implementation at this level is unrealistic. Even though the Draft WIP states that the expanded nutrient trading program will be utilized to achieve these reductions in a cost effective manner, placing this level of burden solely on local governments rather than across all sectors makes the plan inequitable and therefore subject to challenge. Additionally, given the difficult financial position of most local governments, the practicality of relying so heavily on them is questionable.

JRA supports including the following elements in the final WIP:

- Set the waste load allocation for existing urban areas at least at Tier 2 level reductions or Tier 3 levels if needed to achieve particular basin allocations.
- Set a corresponding performance standard for each urban area based on applying the appropriate Tier 2 or Tier 3 level reductions to its specific land covers. This will provide flexibility to the locality in selecting the pollution reducing BMP's. This performance standard should be implemented through the MS4 permit for the urban area.
- Utilize the Clean Water Act "residual authority" to establish a permit mechanism for all urban areas that will be subject to a Phase II WIP allocations.
- Establish urban fertilizer regulations that ban the sale of phosphorus fertilizers except in starter fertilizers and organic-based fertilizers, and require slow release nitrogen formulations or the equivalent.
- As state in the Draft WIP, require new development to keep pollution loads below the allowable 2025 average nutrient loads per acre from previous land uses, so future development does not increase nutrient loads. This standard should be implemented through the state stormwater regulations due to be completed by December 2011.
- Require at least 20% reduction in pollution loads from redevelopment projects with greater requirements for larger and less pervious sites that have the capability to achieve greater reductions with more advances treatment practices.
- Strengthen erosion and sediment controls on construction sites by requiring all "responsible land disturbers" to be trained or be a Professional Engineer and improving the timing of disturbed area seeding/stabilizing and sediment trap sizing.

Septic – Similar to existing urban development, the pollution reductions proposed in the Draft WIP for septic systems are set at the absolute highest levels that are technically feasible. It is widely understood that implementation at this level is unrealistic and were set in order to force

the use of the expanded nutrient trading program. Conversely, septic system allocations should be set at the 2009 loads and a requirement that any new or expanded system use advanced denitrification technology or purchase equivalent nutrient offsets.

Conclusion

JRA very much appreciates the opportunity to comment on the Draft WIP and your consideration of our suggestions and concerns. We also incorporate by reference the comments submitted by the Choose Clean Water Coalition, of which JRA is a member. We believe that through these recommendations and continued discussions with diverse stakeholders, Virginia can develop a final WIP that fully meets its duty to protect its waters in a cost effective and equitable manner that benefits the entire Commonwealth. Virginia will be best served by developing and implementing a strong WIP and avoiding the uncertainties associated with any backstop actions by EPA. JRA look forward to continuing to work with the Commonwealth to accomplish this important task.

If you have any questions or would like to discuss further any of our comments, please do not hesitate to contact me at 804.788.8811 or at bstreet@jraa.org.

Sincerely,

A handwritten signature in dark ink, appearing to read 'W. Street', is positioned above the typed name.

William H. Street
Executive Director